IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5224

GEORGE R. THURSTON, Individually and on behalf of all others similarly situated,

Petitioners,

versus

JOSEPH C. DEKLE, as Chairman, Civil Service Board, Jacksonville, Florida, and WILLIAM HALLOWES, ROGER WEST, DWIGHT BRADDY, BOYD JOLLY, CLARENCE SUGGS, WARREN E. THOMAS, Members of the Civil Service Board, Jacksonville, Florida, and JOHN VAN NESS, Director,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Petitioners, George R. Thurston, and every other person similarly situated in the same or similar class, through their counsel pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit in the case of Thurston, et al, v. Dekle, et al, No. 74-4200 (1976).

OPINIONS BELOW

The United States District Court for the Middle District of Florida, Jacksonville Division, granted declaratory and injunctive relief to petitioner and his class with an opinion on October 8, 1974 reported at 383 F.Supp. 1167 (M.D. Fla. 1974). The Order and Opinion are attached as Appendix A. The Court of Appeals rendered a panel opinion May 20, 1976 which has not yet been reported. It is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1976. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

Is there subject matter jurisdiction to award back pay as a part of equitable relief for the period of time petitioner was suspended or dismissed pursuant to an unconstitutional Civil Service Board regulation in a suit against the individual members of the Civil Service Board and the director of the Department of Housing and Urban Development of the City of Jacksonville, Florida, in an action brought under Title 42 U.S.C.A. Section 1983 for injunctive and declaratory relief?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are set forth in Appendix C:

United States Constitution, Amendment XI

United States Constitution, Amendment XIV

The following Federal Statutes are set forth in Appendix C:

Title 28 U.S.C.A. Section 1343

Title 28 U.S.C.A. Section 1983

STATEMENT OF THE CASE

Petitioners brought a class action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida, Jacksonville Division, against the individual members of the Jacksonville Civil Service Board and the director of the Department of Housing and Urban Development, in their official capacities. Jurisdiction was found pursuant to Title 28 U.S.C.A. Section 1343(3) alleging a cause of action under Title 42 U.S.C.A. Section 1983 for equitable relief. Petitioner's cause of action was based upon their suspension for 30 days without pay from employment with the City of Jacksonville pursuant to Rules 12.4 and 12.8 of the Rules and Regulations of the Consolidated Civil Service Board of the City of Jacksonville, without being afforded prior notice of said suspension and an opportunity for a prior hearing or other due process safeguards to determine the merits of said suspension. Petitioners further alleged that there were no valid guidelines promulgated by the Civil Service Board to determine whether an extraordinary situation exists where some intense governmental interest is at stake to justify postponing the hearing or other due process safeguards until after the suspension.

Petitioner's Motion for Summary Judgment was granted. The Civil Service Board Rules pursuant to which the above claim was based were declared to be violative of the Fourteenth Amendment to the United States Constitution. Respondents were enjoined from suspending or dismissing without pay any nonprobationary employee of the City of Jacksonville, Florida, without providing that employee prior notice and an opportunity for a hearing until such time that defendants promulgate sufficient procedural safeguards specifically

designed to minimize the risk of error attendant to the initial removal and suspension of any City employee, except in those extraordinary situations where it is determined, by objective criteria, that retention of the employee would be detrimental to the interests of the City government, or could be injurious to the employee himself, to a fellow employee or to the general public. The Order and Opinion of the District Court is attached as Appendix A.

The remedy awarded by the District Court, as an integral part of injunctive relief, at issue before the Fifth Circuit Court of Appeals, and the sole issue presented in this Petition for Writ of Certiorari, concerned back pay for the 30 days during which petitioners were suspended without pay pursuant to the unconstitutional Rules. The Fifth Circuit Court of Appeals Affirmed the lower court's Order requiring additional pretermination procedures to minimize the risk of error associated with initial termination but Reversed the Order concerning the award of back pay for lack of subject matter jurisdiction in an opinion attached hereto as Appendix C. Hence, this appeal by Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

This is an essential case to explore federal civil rights jurisdiction over individual municipal officials where the equitable remedy has a financial impact upon the city treasury. Similar issues are presently before this Court on Petitions for Writ of Certiorari in Muzquiz v. City of San Antonio, No. 75-1723, and Monell v. Department of Social Services of the City of New York, No. 75-1914.

1. THE DECISION BELOW, THAT THERE IS NO SUBJECT MATTER JURISDICTION TO AWARD BACK PAY AS A PART OF EQUITABLE RELIEF IN AN ACTION BROUGHT UNDER TITLE 42 U.S.C.A. SECTION 1983 AGAINST THE INDIVIDUAL MEMBERS OF THE CIVIL SERVICE BOARD AND THE DIRECTOR OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEALS.

The lower court found jurisdiction to award declaratory and injunctive relief but did not find jurisdiction to award back

pay as a part of the equitable relief. This bifurcated "remedy-asked" approach to federal jurisdiction whereby the meaning of the work 'person' changes with the nature of the relief asked conflicts with the Supreme Court's decision in Kenosha v. Bruno, 412 U.S. 507 (1973), where the Court clearly held that the meaning of the work 'person' does not change with the nature of relief sought.

Since Kenosha, supra, barred Section 1983 suits for injunctive and declaratory relief against cities, the Supreme Court has approved injunctions issued against public officers under Section 1983. Goss v. Lopez, 419 U.S. 499 (school officials); Wolff v. McDonnell, 418 U.S. 539 (1974) (pension officials). Moreover, in Bradley v. School Board, 416 U.S. 696 (1974), the Court permitted a suit under Section 1983 to require the payment of an attorney's fee to be charged against the Board itself. To find subject matter jurisdiction over public officials for declaratory and injunctive relief but not as to the remedy of back pay, which is an integral part of injunctive relief, is a bifurcated approach squarely in conflict with Kenosha, supra, insofar as it changes the meaning of the work 'person' with the nature of the relief sought.

The Fifth Circuit is now not only in conflict with the Supreme Court, but is in conflict with other Circuits as well as with itself. The decision below conflicts with decisions of the Fourth and Sixth Circuit Courts of Appeal as to jurisdiction over public officials for equitable relief under 42 U.S.C.A. Section 1983 where the judgment affects the public treasury.

A complete conflict exists between the decision below and the Fourth Circuit Court of Appeals in Thomas v. Ward, 529 F.2d 916 (4 Cir. 1975) and in Burt v. Board of Trustees of Edgefield County School District, 521 F.2d 1201 (4 Cir. 1975) where the Court held that the individual municipal officers sued in their official capacities were 'persons' under Section 1983 for equitable relief including back pay. The back pay award was affirmed by the Fourth Circuit Court of Appeals in Burt, supra, as a part of equitable relief.

The decision below conflicts in principle with the Sixth

Circuit Court of Appeals in Incarcerated Men of Allen Co. Jail v. Fair, 507 F.2d 281 (6 Cir. 1974) where the Court affirmed an award of attorney's fee against the local officials as a part of the equitable remedy despite its severe impact on local government funds. See Brown v. Board of Education, 349 U.S. 294 (1955).

The Second Circuit Court of Appeals in Monell v. Department of Social Services of City of New York, 532 F.2d 259 (2 Cir. 1976) in dicta implicitly acknowledged that an award of attorney's fees would have been permissible under Section 1983 even though the attorney's fee would be paid out of the public funds saying "[T]hat is not the same as awarding damages". However the Monell, supra, decision on appeal to the Supreme Court, erroneously found back pay to be a form of damages, whereas they would have approved back pay as an adjunct of equitable relief if coupled with reinstatement.

Both the decision below, and Muzquiz v. City of San Antonio, 528 F.2d 499 (5 Cir. 1976) (en banc), upon which the decision below was based, depart dramatically from what had heretofore been the law in the Fifth Circuit. The Fifth Circuit has upheld back pay awards as a part of equitable relief against individual public officials despite the fact that the judgment would be satisfied by the government treasury. Harkless v. Sweeney, 427 F.2d 319 (5 Cir. 1970). This dramatic departure from prior rulings was hardly met with uniform enthusiasm by the panel en banc in Muzquiz, supra, as evidenced by seven dissenting panel members who believed 42 U.S.C.A. Section 1983 permits suits against individuals acting under color of state law for restitution and other equitable relief.

These conflicts therefore justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES SIGNIFICANT AND IMPORTANT PROBLEMS CONCERNING MEANINGFUL ENFORCEMENT OF 42 U.S.C.A. SECTION 1983.

The decision below denying jurisdiction over municipal officials in a claim brought under 42 U.S.C.A. 1983 where the equitable relief includes back pay which has an impact upon the city's treasury, virtually destroys an aggrieved individual's right to redress under the Civil Rights Act for a denial of constitutional rights. As stated by Justice Tuttle in his dissenting opinion, in Muzquiz, supra, joined by Judges Wisdom, Goldberg and Morgan:

> "...The Court seems to me to have whittled down the clear statutory grant of civil rights litigation under color of state law to little more than an empty promise." 528 F.2d at 501

The decision below has a far-reaching adverse impact on the protection of an individual's constitutional rights as it is difficult to conceive of a situation where a person acts under color of state law without being involved in a governmental type body. It is hard to imagine any injunctive relief against a public officer without it having an effect on the finances of the entity it represents. There is no real distinction between the impact on local funds in reinstatement and back pay cases, and jail reform or school desegregation cases where the implementation of affirmative action ordered necessarily requires the expenditure of public funds. If the lower court's holding stands, civil rights remedies in equity will be virtually eliminated.

The decision below not only practically destroys civil rights remedies in equity, but will be almost impossible to apply consistently. Mass confusion has been created by the conflict between the Circuits and within the Fifth Circuit as to what type of monetary relief adversely affecting the public treasury is 'damages' and what type of monetary remedy is incidental to equitable relief. For instance, while there was no distinction recognized in Muzquiz, supra, between damages and monetary awards incidental to equitable relief, the distinction has been recognized though applied inconsistently between the other Circuits. While the Second Circuit in Monell, supra, would have permitted an attorney's fee award against the individual officials under Section 1983 and disallowed back pay as a form of damages, the Sixth Circuit in Incarcerated Men of Allen Co. Jail, supra, specifically upheld an award of attorney's fees as a part of equitable relief under Section 1983 as it would have upheld an award of back pay. The confusion wrought by the "remedy-asked" approach to jurisdiction enunceated by the Fifth Circuit in Muzquiz, supra, and applied in the decision below is also readily evident from reading Chief Judge Brown's and Judge Thornberry's concurring and dissenting opinions in Muzquiz, supra. As Judge Thornberry pointed out, the test for jurisdiction adopted by the Court will

be next to impossible to administer.

. . .

The importance of this case justifies the grant of certiorari to review the judgment below.

3. THE DECISION BELOW IS IN ERROR

While the Fifth Circuit is concerned with the "everburgeoning area of relief sought under 42 U.S.C.A. Section 1983", it virtually eliminates the Court's jurisdiction without any case or statutory precedent. 528 F.2d at 501. While the Supreme Court has held that a municipal corporation is not a 'person' under the Civil Rights Statute 42 U.S.C.A. Section 1983, the Court has not held that a true 'person' cannot be sued merely because by means of the suit the public fisc would be reached through the Court's equity powers. The Supreme Court in Edelman v. Jordan, 415 U.S. 651, note 12 (1974), made it clear that none of the considerations of sovereign immunity from suit should be imparted into a court's consideration of civil rights jurisdiction over municipal officials.

Moreover, the fashioning of equitable relief is largely within the District Court's discretion to be exercised with a "...practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs". (footnotes omitted) Brown v. Board of Education, supra. The decision below which declares the Rules pursuant to which petitioner was suspended unconstitutional but denies back pay for the period of time he was denied the property interest in his job without due process of law leaves the petitioner and his class without remedy. The decision below circumvents the purpose of Section 1983 "to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights". 427 F.2d at 324.

Finally, the Muzquiz, supra, decision is distinguishable from the present case Under the peculiar facts in Muzquiz, supra, the action for declaratory and injunctive relief were so related to the restitution claim for refunds from the pension fund that the Court dismissed the entire action for lack of subject matter jurisdiction.

> "Thus, we conclude that under the peculiar facts of this case, either a mandatory injunction directed against the individual members of the Board, or injunctive and declaratory relief with respect to

> the statute is tantamount to a money judgment for restitution against the fund, an entity against which relief may not be directed under the court's Section 1983 jurisdiction." 528 F.2d at 501

By contrast, in the present case, the award of back pay was discretionary within the Court's equity power and purely incidental to the Court's injunction and declaration that the regulation was unconstitutional. The injunctive and declaratory relief with respect to the regulation in the present case was not tantamount to a money judgment. The ancillary remedy of back pay was far more akin to an award of attorney's fees which both the Second and Sixth Circuits have upheld as being incidental to equitable relief. The Fifth Circuit's own limitation of the Muzquiz, supra, holding to the peculiar facts of the case can be construed as their intention to leave the Harkless, supra, ruling intact.

The broad application of the Muzquiz, supra, decision to the facts of this case makes city officials immune from any equitable relief which will require an expenditure of public funds. If the lower court's decision stands, the unconstitutional violation of individual rights by municipal officials will go without remedy.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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August 13, 1976

Note: Appendix A, the opinion and order of the District Court was not of photographic quality for reproduction. It can be found at 383 F.Supp. 1167 (M.D. Fla. 1974).

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

CITATIONS

OTHER AUTHORITIES

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph C. Dekle, et al., respondents oppose the issuance of a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition, and submit herewith their brief in opposition.

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported as *Thurston v. Dekle*, 5th Cir. 1976, 531 F.d 1164.

QUESTION PRESENTED

WHETHER SUBJECT MATTER JURISDICTION EXISTS UNDER 28 U.S.C. §1343(3) AND 42 U.S.C. §1983 AGAINST INDIVIDUAL MEMBERS OF MUNICIPAL AGENCIES IN THEIR OFFICIAL CAPACITIES, FOR THE AWARD OF BACK PAY AND OF REINSTATEMENT OF EMPLOYEES DISCHARGED UNDER AN UNCONSTITUTIONAL CIVIL SERVICE REGULATION, WHERE THE BACK PAY WOULD OF NECESSITY BE FROM THE CITY TREASURY, AND ANY REINSTATEMENT COULD BE ORDERED BY SUCH OFFICIALS ONLY IN THEIR OFFICIAL CAPACITY.

STATEMENT OF THE CASE

Respondents accept the statement of the case contained in the petition for certiorari, except with the caveat that there is no showing this to be a class action petition. Petitioners, thus, should be changed to petitioner.

ARGUMENT

REASONS WHY WRIT SHOULD NOT BE GRANTED

1. LACK OF JURISDICTION.

A court of the United States does not have jurisdiction of an action brought under 28 U.S.C. §1343(3) and 42

U.S.C. §1983 against individual members of a municipal civil service board, solely in their official capacities, and the director of a municipal department, solely in his official capacity, for reinstatement and back pay.

Thurston claims jurisdiction is conferred upon this Court by virtue of 28 U.S.C. §1343(3) because of 42 U.S.C. §1983.

This Court has held on three separate occasions that a municipality is not a person under the above statute. *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492 (1961); *Egan v. City of Aurora*, 365 U.S. 514, 5 L.Ed.2d 741 (1961); and *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 222, 37 L.Ed.2d 109 (1973).

In its most recent pronouncement, this Court held that a federal district court was without jurisdiction of an action brought against a municipality under 42 U.S.C. §1983.

It is clear, from long established decisions of this Court that the suit of Thurston is a suit against the City, although there are nominal individuals named defendants. In considering cases under the Eleventh Amendment to the United States Constitution, this Court has held on many occasions that the amendment applies to any suit brought in name against an officer of the state, when the state, though not named, is the real party against which relief is asked and the judgment will operate. *In re Ayers*, 123 U.S. 443, 8 S.Ct. 164 (1887), 31 L.Ed. 216; *Minnesota v. Hitchcock*, 185 U.S. 386, Minn. 1902, 22 S.Ct. 650, 46 L.Ed. 954. c.f. *Louisiana v. Jumel*, 107 U.S. 711, 2 S.Ct. 127, 27 L.Ed. 448 (1883).

From the foregoing, it should be obvious that plaintiff is seeking to do indirectly what he can not do directly.

Defendants are not suggesting that a prohibitory injunction cannot issue, even against a state officer. The law has too long been to the contrary. *Ex parte Young*, 209 U.S. 123, 228 S.Ct. 441 (1908), 52 L.Ed. 714.

When, however, the action is one, as here, seeking reinstatement and back pay, it falls clearly within the penumbra of the "real party in interest" rule.

There is a great similarity in an action against a state officer, in his official capacity, as being an action against a state, forbidden by the Eleventh Amendment to the Constitution of the United States; and a 42 U.S.C. §1983 action against a municipal officer, in his official capacity, as being, in reality, a suit against the City, over which the Court lacks jurisdiction when the plaintiff is seeking back pay.

This Court in its most recent decision on the matter--*Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662 (1974), re-enforces the long established "real party in interest" rule. This Court in quoting from *Ford Motor Co. v. Department of Treasury*, 323 U.S.459, 89 L.Ed. 389 (1945) said:

> "When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."
>
> 415 U.S. at 663
>
> • • •
>
> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."
>
> 415 U.S. at 663

No suggestion is made herein that a municipality has eleventh amendment protection, however, it is argued that if in reality the action is against a municipality, albeit a public officer, in his official capacity, is a nominal party, the same rules of construction apply. For, as stated by the Court in *Edelman*,

> "These funds will obviously not be paid out of the pocket of petitioner Edelman."
>
> 415 U.S. 664

It would be an over simplification to say that, although a court of the United States would lack jurisdiction over the City under a §1983 action, *full* and *complete* relief could be granted by issuing a mandatory injunction against a municipal officer defendant, thus moving the City through him. As long ago as 1883, where it was sought affirmatively to compel the performance of a state's contract by mandamus against its officers requiring the application of funds in the State Treasury, and the collection of a specific tax authorized by law for the retirement of state lands, it was held to be a suit against the state. *Louisiana v. Jumel*, 107 U.S. 711.

As this Court makes clear in *Edelman v. Jordan, supra*, prohibitory injunctions are one thing--mandatory injunctions another.

2. PATENT CORRECTNESS OF DECISION OF WHICH REVIEW IS SOUGHT.

For the reasons stated in *Muzquiz v. City of San Antonio*, 5th Cir. 1975, 528 F.2d 499 (en banc), and *Monell v. Dept. of Soc. Serv. of City of New York*, 2d Cir. 1975, 532 F.2d 259, the decision of which review is sought, *Thurston v. Dekle*, 5th Cir. 1976, 531 F.2d 1254, is correct.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

William Lee Allen

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FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Respondents Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been duly served upon PAUL C. DOYLE, ESQUIRE, and CAROLYN S. ZISSER, Duval County Legal Aid Association, 205 East Church Street, Jacksonville, Florida 32202, Attorneys for Petitioners, by United States mail, this 10 day of September, 1976.

William Lee Allen

Attorney